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ALOM BUILDING SYSTEMS SDN BHD

v.

MALAYSIA EXPORT CREDIT INSURANCE BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM JC
[SUIT NO: D3-22-64-2006]
8 SEPTEMBER 2009

C

INSURANCE: *Export-credit insurance - Contract of guarantee - Insuring exporter against non-payment by buyer - Claim against insurer for non-payment by buyer - Ascertainment of loss - Whether sufficient for exporter to merely wait six months in order to claim - Whether insurer could require exporter to comply with additional conditions - Estoppel - Whether buyer*

D

had claimed to be justified in withholding payment to exporter - Guarantee on payment by buyer - Whether conditions precedent in contract conjunctive or disjunctive - Whether insurer could require exporter to comply with all disjunctive conditions - Whether would lead to commercial absurdity

E

INSURANCE: *Construction of policy - Export-credit insurance - Claim by exporter against insurer for non-payment of buyer - Ascertainment of loss - Words, ordinary meaning or settled meaning within industry - Objective against subjective intention of parties - Fair and reasonable*

F

construction - Avoiding absurd or unjust interpretation that would render object of policy illusory - Function of court, whether should determine product dispute between exporter and buyer - Whether exporter had shown its claim to be within four corners of policy and its loss within perils insured against

G

WORDS & PHRASES: *'Or' - Plain and ordinary meaning - Disjunctive - Alternative - Export-credit insurance - Contract of guarantee*

WORDS & PHRASES: *'Claim' - Ordinary, dictionary meaning - Common-sense meaning - The aggregate of operative facts giving rise to a*

H

right enforceable by a court - Assertion - Demand - Specific claim to be justified in withholding payment

I

Alom Building Systems Sdn Bhd ('the plaintiff') had secured a USD1.4m contract with one World Cover Inc ('WCI') to supply and install a roofing system for an airport in Oklahoma, USA. To finance the project the plaintiff applied for a loan from Exim Bank

Bhd ('Exim'), which application was approved subject to the plaintiff taking out a policy ('the Policy') from Exim's sister company Malaysia Export Credit Insurance Bhd ('the defendant'). The Policy was to cover the contingency that the plaintiff was not paid by WCI for the work done. Before the defendant would issue the Policy, the plaintiff was required to - and it did - obtain a corporate guarantee or letter of undertaking ('the guarantee') from WCI's parent company Layne Christensen Co Inc ('LCCI'). Under the Policy the defendant would cover the plaintiff for up to 90% of its losses in the event that payment was not received from WCI six months after it had become due. As it transpired, WCI did not pay the plaintiff a total of USD670,000, and the plaintiff made a claim on the defendant for USD603,000, which claim was repudiated by the defendant on the ground that the claim was premature as loss had not yet been ascertained as per provisos (b) and (c) to para 14 of the Policy. [Proviso (b) governs a situation where WCI (as buyer) took the position that it was justified in withholding payment to the plaintiff, whilst proviso (c) comes into play where there is (as in the present case) a guarantee or letter of undertaking.]

As regards proviso (b), it was argued for the defendant that because WCI took the position that it was justified in withholding payment to the plaintiff, the plaintiff's loss could not be ascertained unless: (i) WCI has resiled from such a position; or (ii) the plaintiff has established the validity of invalidity of WCI's position through proceedings in the USA. Respecting proviso (c), it was contended that the plaintiff's loss could not be ascertained until after: (i) LCCI has paid the amount payable under the guarantee; (ii) the plaintiff has obtained judgment against LCCI in the USA; (iii) the plaintiff has satisfied the defendant that its claim against LCCI was a valid one.

Conversely, the plaintiff argued that provisos (b) and (c) did not apply. Relying on para. 14(2) of the Policy, it contended that as long as six months had lapsed since payment from WCI became due it could lodge a claim with the defendant. In any case, it was also argued that the three requirements or conditions in proviso (c) must be read disjunctively.

Held (allowing the plaintiff's claim):

(1) The plaintiff was right to have abandoned its initial argument that provisos (b) and (c) applied only in respect of para. 14(4) of the Policy. Indeed, provisos (b) and (c) applied to the whole of para. 14, including para. 14(2) on which the plaintiff

had relied. Hence, it was not sufficient for the plaintiff to merely allow a lapse of six months in order to solidify its claim. (paras 27 & 28)

(2) Proviso (b) to para. 14 of the Policy was inapplicable in the instant case. When the dispute first arose, the defendant had relied on proviso (c) and had required the plaintiff to comply with proviso (c) (*ie*, to enforce the guarantee against LCCI). It was only later that the defendant altered its course and required the plaintiff to comply with proviso (b) (*ie*, to move against WCI). Having required the plaintiff to comply with proviso (c), and having led the Plaintiff to act on such a requirement, it was not open to the defendant to subsequently require another additional compliance. The defendant could not rely on the cover of 'without prejudice' provisions as estoppel would operate to prevent injustice. (paras 31, 32, 33 & 34)

(2a) In any case, there was no evidence that WCI had claimed to be justified in withholding payment to the plaintiff so as to activate proviso (b). There must be a direct and specific claim, assertion or demand from WCI that it was justified in withholding the payment, which there was not on the evidence. (paras 35, 36, 37, 38, 39, 41, 42 & 44)

(3) Proviso (c) to para. 14 of the Policy was applicable here as there was a guarantee by LCCI. However, the three requirements or conditions within that proviso were not conjunctive. The plain and ordinary meaning of the word 'or' meant that they were disjunctive or in the alternative. To hold otherwise would lead to an absurdity or illogicality which the parties could not have intended contractually or commercially. Hence, the defendant could only require the plaintiff to fulfil one of the three conditions in proviso (c). (paras 45, 46 & 47)

(3a) It was clear from the parties' correspondence that the defendant had chosen to require the plaintiff to fulfil the third condition in proviso (c), *ie*, to satisfy the defendant that the plaintiff's claim against LCCI was a valid one. (paras 48, 49 & 58)

(3b) It was not for the court to determine the product dispute between the plaintiff and WCI. Indeed, the emphasis in export-credit insurance is to shift away from such issues as between the exporter and the buyer. All that had to be shown here were the delivery orders or packing lists, bills of lading, shipping reports, quality control sheets and the unpaid invoices or monthly progress claims for payments. Such evidence was properly before the court. The plaintiff had shown that its claim was within the four corners of the Policy and that its loss was within the perils insured against. (paras 51, 52, 53 & 54)

(3c) From the testimony of the parties and the independent reports, the plaintiff's claim against LCCI on the guarantee was also valid. (para 55)

[Judgment for plaintiff in the sum of USD603,000 with interest at 4% pa from 29 August 2002 until date of realisation and costs of RM60,000.]

Case(s) referred to:

Boman Industries Pty Ltd v. Export Finance and Insurance Corporation [1990] NSW LEXIS 10744 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd AIR [1965] SC 1288 ***(refd)***

Glamour Green Sdn Bhd v. Ambank Bhd & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***

Investors Compensation Scheme Limited v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***

Messagemate Aust P/L v. National Credit Insurance (Brokers) P/L & Ors [2002] SASC 327 ***(refd)***

Ontario Ltd [Receiver and Manager of] v Export Development Corp [2005] O.J. No. 3066 ON.C. LEXIS 3744 ***(refd)***

Scottish decision of Atraduis Credit Insurance NV v. Whyte And Mackay Ltd [2005] ScotCs CSOH 23 ***(refd)***

Setapak Heights Development Sdn Bhd v. Tekno Kota Sdn Bhd [2006] 2 CLJ 337 CA ***(refd)***

For the plaintiff - Avinder Singh Gill; M/s AS Gill & Salina
For the defendant - Faizal Hassan Abdul Hamid; M/s Edlin Ghazaly & Assocs

Reported by Gan Peng Chiang

A

JUDGMENT

Mary Lim JC:

Facts & Issue

B **[1]** The plaintiff has been in the business of manufacturing and supplying tensile building roofing systems for any type of structure for the last 20 years. In 2001, the plaintiff secured a contract with World Cover Inc. (World Cover) to fabricate, supply and install the Alite Tension Membrane Structure for the Arrival Roadway at the C Tulsa International Airport, Oklahoma, USA. The contract value was USD1.4 million (RM5.32 million). Apart from some advance and delivery payments, the payment terms in that contract was based on progressive claims submitted by the plaintiff to World Cover.

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[2] However, the plaintiff required financial assistance in order to carry out this contract. The plaintiff went to Export-Import Bank of Malaysia Berhad (Exim Bank) who agreed to provide financing subject to the plaintiff taking out insurance against the possible E non-payment by World Cover. The plaintiff was specifically directed to purchase such policy from the defendant, a sister company of Exim Bank.

[3] Before the defendant agreed to provide cover, it imposed a F special condition. It required the plaintiff to obtain a corporate guarantee or letter of undertaking from World Cover Inc's parent company, Layne Christensen Company Inc (Layne Christensen). That guarantee or undertaking must further be valid and enforceable in USA. Layne Christensen provided the guarantee/letter of G undertaking - Bundle B p. 1; and a policy dated 31 January 2001 was then concluded between the plaintiff and the defendant (specific policy). The premium paid by the plaintiff was RM45,486.

[4] Under the specific policy, the defendant agreed to *inter alia* pay the plaintiff 90% of its losses in the event World Cover failed H to pay the plaintiff after six months of payment becoming due.

[5] Then, the very risk or event for which the specific policy was taken out happened - World Cover failed to pay the plaintiff a total progress payment of USD670,000. On 29 August 2001, the plaintiff I made a claim on the defendant for 90% of that sum, an amount of USD603,000. The defendant refused to pay and the plaintiff sued for

breach of the specific policy. The defendant pleaded primarily that the claim was premature as loss had not been ascertained as required under the terms of the specific policy.

[6] It is beyond dispute that before a claim may be realized, para. 14 of the specific policy provides that loss has first to be ascertained. The issue therefore is whether, on the facts and in the circumstances of this case, loss has been ascertained under para. 14 in particular, under provisos (b) and (c) to para. 14. Proviso (b) governs a situation where the buyer, World Cover claims it is justified in withholding payment to the plaintiff whereas proviso (c) is where there is a guarantee. This issue in turn needs to be considered from two perspectives. First, whether either or both provisos apply. Second, whether the conditions within the provisos themselves are to be read disjunctively or otherwise.

Submissions

[7] I shall summarize the submissions of both counsel highlighting only the pertinent issues and responses raised.

[8] Mr. Faizal Hassan, learned counsel for the defendant submitted that loss had not been ascertained under both provisos to para. 14. First, because World Cover claimed to be justified in withholding payment to the plaintiff, proviso (b) to para. 14 provides that unless the defendant agrees to the contrary, loss is not to be ascertained until World Cover has withdrawn its claim, the plaintiff has established the validity or invalidity of its claim by legal proceedings against World Cover in the United States or in such other manner as may be approved by the defendant. Second, because there is a guarantee, proviso (c) to para. 14 provides that loss is not to be ascertained until Layne Christensen, the guarantor has paid the amount payable under the guarantee, or the plaintiff has obtained judgment against Layne Christensen in the United States, or has satisfied the defendant in such manner as the defendant may determine that the plaintiff's claim against Layne Christensen is a valid claim.

[9] It was the submission of the defendant that until the plaintiff fulfilled all the conditions precedent specified in these two provisos, the defendant was not obliged to pay. It is only upon fulfillment of the conditions that loss is said to be ascertained. It is only at this point that the obligation to pay arises and not any earlier. Because none of these factors have been satisfied, the claim was thereby said to be premature.

[10] It was the further submission of Mr. Faizal Hassan that the defendant had the option to decide whether all or any of the conditions precedent set out in the provisos had to be fulfilled. In this case, the defendant required the plaintiff to fulfill all the conditions specified in both provisos (b) and (c).

[11] The first argument canvassed in response by Mr. Arvinder Singh Gill, learned counsel for the plaintiff was that the provisos in para. 14 do not apply as the plaintiff was relying on para. 14(2). Under this paragraph, all that the plaintiff is required to do is wait six months from the time when payment is due from World Cover. If after six months, World Cover is still in default, the plaintiff may then lodge its claim with the defendant. The plaintiff claims to have complied with para. 14(2). It was also contended by learned counsel that the provisos only applied in the context of para. 14(4) and not when a claim is lodged under para. 14(2), as is the case of the plaintiff.

[12] Insofar as proviso (c) is concerned, it was submitted that the requirements in this proviso must be read disjunctively. That is to say, the defendant must choose from amongst the three requirements or conditions precedent set out in the proviso. The defendant cannot choose all three. In making that choice, the defendant must be fair, just and reasonable having regard to the available circumstances. It was argued that requiring the plaintiff to sue Layne Christensen in the United States before the defendant would agree to pay was not only unfair and unjust, but will cause unnecessary time and expense. In any case, the facts show that the defendant had opted for one of the three requirements, that is, for the plaintiff to satisfy the defendant that the claim against Layne Christensen was valid. Having led the plaintiff to rely and comply with this requirement, it was wrong for the defendant to now deny the plaintiff's claim.

[13] Similarly, the requirement for the plaintiff to sue and procure judgment against World Cover before payment would be effected was unjustified. Particularly since the plaintiff regarded its claim as valid as evidenced by the opinions of two independent experts, one of whom was proposed by the defendant. Having asked for such reports, it was again wrong for the defendant to ignore the reports procured and instead insist on the plaintiff suing World Cover in the United States.

Findings

[14] At the start of submissions, I was informed by both learned counsel that there was no local case law specifically on export-credit insurances. That being so and since the Specific Policy here is actually what is known in the industry as export-credit insurance, I invited both counsel to expand their area of research into other jurisdictions with a view to determining whether there is an accustomed approach in the interpretation of the unusual terms of export-credit insurance. From the materials submitted including information found on the website of the U.S. Export Assistance Center, Portland, it appears that export-credit insurances evolved as an alternative to letters of credit and other international banking negotiable instruments. With export-credit insurances, sellers such as the plaintiff are said to be able to remain competitive as they are in the position to offer credit terms for payment to the foreign buyer whilst at the same avoid risks of non-payment. Domestic insurances are inadequate or even inapplicable due to enforceability issues as the defaulting buyer is located in foreign jurisdictions.

[15] The risks most commonly covered are commercial, economic and political risks of default. By commercial risks it generally means the risk of non-payment due to insolvency of the buyer, or failure to pay within six months after delivery and acceptance of goods by the buyer. Product disputes remain matters within the contract between the buyer and seller whereas export-credit insurance contracts shift the focus to the dispute between the seller and the insurance provider. Export-credit insurances are also frequently required as part of financing arrangements secured to fund the primary contracts for the supply of the goods. And this was precisely what transpired here when the plaintiff was specifically directed by Exim Bank to procure the specific policy with its sister company before funding for the contract with World Cover would be provided.

[16] As explained by Sharidah Hanafiah, Head Claims and Recoveries Department (DW1), the defendant is a member of an international organization of underwriters of export-credit and investment insurance called the International Union of Credit & Investment Insurers or more popularly known as the Berne Union. This body regulates within itself and between its members though such regulation is merely collegiate and has no legal ramifications. It appears that the specific policy in question as opposed to comprehensive polices is a fairly typical sample of the specific policy

offered by the defendant. However, from the case law offered by counsel, it can be seen that many jurisdictions and certainly contracting parties have taken to designing the contracts to tailor-fit the peculiarities and needs of contracting parties. In the case of the Specific Policy, it was a fairly standard form contract offered by the defendant. It is important to appreciate this background as it provides the context under which this Specific Policy is to be understood and its terms construed.

Construing Insurance Contracts

[17] In construing the terms of the specific policy, certain fundamental principles of construction must be adhered to. Much of what was observed by the Supreme Court of South Australia in *Messagemate Aust P/L v. National Credit Insurance (Brokers) P/L & Ors* [2002] SASC 327 on the principles to be adopted when construing insurance contracts is of general application when construing any contract. It nevertheless is insightful and of much guidance and I shall set these well-established principles which were summarized by the Supreme Court as follows:

> (1) An insurance policy is a species of commercial contract. It must be interpreted so as to give the words used their ordinary meaning. The primary duty of a court is to discern from the language, structure and apparent purpose of the document what it means. A court should give the words used their ordinary operation. The Court is to search for the meaning of the words used. If in those words there is only one meaning, a court may not reject it simply because it regards the result as unfair or otherwise undesirable.
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> (2) Where a word or a phrase has a settled meaning in insurance contracts, the Court will hesitate before departing from that meaning.
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> (3) A fair and reasonable construction should be adopted which would take into account the variety of persons entering into an insurance contract of the type in question. The ordinary meaning of the words in a policy is to be ascertained having regard to the context in which they appear, the purpose of the policy, the presumed common intention of the parties and in the light of all the relevant circumstances, or objective background facts, known to both the parties. The presumed intention must be derived from the words used in the policy and the objective facts.

(4) It is the objective intention of the parties that the court looks to only and not the subjective intention or actual intention of the parties. The fact that a particular assured has interpreted the words in a particular way is irrelevant. A

(5) The meaning to be given to the insurance policy must take into account the commercial and social purposes for which it was written. Wherever possible, an absurd or manifestly unjust result will be avoided upon the hypothesis that such would not have been intended by the parties. However, because the primary search is for the ordinary and fair meaning to be attributed to the words used, no court is authorized under guise of construction to make a new contract for the parties which is at odds with the terms of the contract it which they have agreed. B C

(6) If the words used in the policy are intractably ambiguous, the words will be construed *contra proferentum*. This principle is to be applied as a "last resort" if the true meaning cannot otherwise be determined from dictionaries and logic alone. The maxim does not apply if the words used in the policy are not ambiguous, obscure or uncertain. An apparent ambiguity in the policy may be resolves reading it as a whole and in examining the commercial purpose of the contract. D E

[18] The Supreme Court of South Australia in *Messagemate* referred to a leading textbook on insurance, *Derrington & Ashton on the Law of Liability Insurance* where paras. 110 and 113 of Chapter 3 were cited. Again, I find these passages of help and I shall set them out: F

110. The basic purpose of the policy and the hazards which it was intended to afford protection will usually be relevant to construction. Where there is inconsistency or ambiguity in the terms of the policy, regard must be had to its plain object and portions may be modified or rejected to achieve that plain object and the court may make use of its knowledge of what type of policy would ordinarily be required by persons in the position of the insured, so that the policy will not be construed so as to render it practically illusory. In order to avoid the result, "some qualification must be put on the words used" ... G H

113. Alternatively to the above principles, a construction will not be adopted the effect of which would be to restrict the cover to the point of absurdity. Where one construction would have the effect of rendering the term meaningless, an alternative construction avoiding this result will be preferred. "This is so I

A unreasonable that it must make one search for some other possible meaning of the contract. If none can be found then (the insured) must suffer the consequences."

[19] In the *Scottish decision of Atraduis Credit Insurance NV v. Whyte And Mackay Ltd* [2005] ScotCs CSOH 23 similar principles as B discussed above were applied. In that case, the insurance company had already paid up on the occasion of non-payment by the buyer. Under the terms of the policy, the seller was obliged to take action to affect recoveries. But the seller failed to do so and it was argued C that such failure entitled the insurance company to seek a refund of monies paid over. The Outer House Court of Session of Scotland said:

> The parties were agreed that, in construing the provisions of Article 24c, I should follow the guidance to be found in the cases to which D I have referred, *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896, *Bank of Scotland v. Dunedin Property Investment Co Ltd* [1998] SC 657 and *Bank of Credit and Commercial International S.A. v. Ali & Others* [2002] AC 251. That involves seeking to determine the meaning which the E terms of that Article would convey to a reasonable person, having all the background information that was known or should have been available to NCM and Invergordon, when the Guarantee was concluded. It is an objective exercise, involving an enquiry into what the terms of that Article mean, rather than what NCM and Invergordon may have intended them to mean. It is also an exercise F which can be embarked upon by addressing what is the ordinary meaning of the words found in Article 24c.

[20] Although the terms in both the authorities cited are somewhat differently worded from those in the Specific Policy in G that there are no options given to the insurance companies, it can be seen that the general principles of construing contracts, be it for general contracts or specific contracts of insurance including export-credit insurance, are fundamentally the same. In *Glamour Green Sdn Bhd v. Ambank Bhd & Another Appeal* [2007] 3 CLJ 413 @ 429, a H case on the construction of loan documents, Gopal Sri Ram JCA (as he then was) said:

> ... We begin by recognizing that there are no rules of construction. It is true that at one point in time courts did refer to the principles they applied when interpreting bilateral documents as being "rules". I But the modern approach is different. It is set out in *Chitty on Contracts*, (28th edn) Vol. 1 p. 604, para. 12-045:

> Certain rules of construction have been formulated by the courts. Previously, these rules were applied somewhat rigidly and adhered to tenaciously (even though the application of one rule in preference to another might lead to an opposite result). However, it was pointed out that the modern approach in construction is 'to assimilate the way in which (contractual) documents are interpreted by judges to the common-sense principles by which any serious utterance would be interpreted in ordinary life'. As a result, most rules of construction nowadays better regarded as guidelines or assumptions as to what the court may regard as the normal use of language and which assist judges to arrive at a reasonable interpretation of the parties' intentions, though subject to examination of the relevant circumstances surrounding the transaction. Some rules, on the other hand, such as the *contra proferentum* rule, are of a different nature in that they are less obviously designed to ascertain the intentions of the parties and are more closely assimilated to 'rules' in the traditional sense.

[21] The Court of Appeal in that decision went further to examine several other decisions before looking at the landmark decision of *Investors Compensation Scheme Limited v. West Bromwich Building Society* [1998] 1 WLR 896 which was cited and relied on in the Scottish decision of *Atraduis Credit Insurance*. The five propositions to guide contractual interpretation identified by Lord Hoffman are:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of facts', but this phrase is if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected by way in which the language of the document would have been understood by a reasonable man.
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> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and in this respect, legal interpretation differs from the way we

A would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion in which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the B meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the documents is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to C choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investments Co Ltd v. Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, ..)

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(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one were to nevertheless conclude from the background that E something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly would not have had.

[22] With these well-trodden guidelines in hand, the Court of F Appeal proceeded to interpret the loan documents against the factual matrix which formed the background in order to discern the objective intention of the parties. Where the words used are plain and clear, the court's duty is to give effect to the parties' intention regardless how the court may feel about it - see *Setapak Heights* G *Development Sdn Bhd v. Tekno Kota Sdn Bhd* [2006] 2 CLJ 337, quoting from *Central Bank of India Ltd, Amritsar v. Harford Fire Insurance Co Ltd AIR* [1965] SC 1288 where it was held that:

> Now it is commonplace that it is the court's duty to give effect to the bargain of the parties according to the intention and when that H bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

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[23] From these authorities, it is clear that in interpreting the terms of this Specific Policy, the first task of this court is to discern the ordinary meaning of the words used. A settled meaning in the industry will of course prevail over the ordinary meaning. When determining the intention of the parties, it is the objective and not subjective intention which is relevant. A fair and reasonable construction is then adopted when putting a context to the words used. A construction that leads to absurdity or manifestly unjust results or where the object or purpose for which the contract was first entered into becomes illusory ought to be avoided as surely this could not have been the intention of the parties. Where there are ambiguities, the *contra proferentum* rule will apply. This tool kit of principles for interpreting and construing the terms of the Specific Policy will be engaged in order to determine whether the defence put forth in this case holds true in law and on the facts. I must however add that this Specific Policy is but a contract of guarantee. The defendant is guaranteeing against non-payment by the buyer.

Scope And Application Of Paragraphs 2 And 14

[24] It is not in dispute that if the claim is proved, then the defendant is to pay the plaintiff 90% of the loss. That loss is the unpaid progress payment of USD670,000. In other words, in the event it is proved that loss has been ascertained, the defendant would then be required to pay USD603,000 on a fixed exchange rate of USD1 @ RM3.80. For this purpose, paras. 2 and 14 require close scrutiny. It would therefore be most beneficial if both these clauses are set out in extenso in order to appreciate their true intent and purpose.

[25] Paragraph 2 which provides for the type of risks covered states:

> Risks Covered
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> The Company agrees, subject to the terms hereof, to pay the Exporter 90% of the amount of any loss, calculated in accordance with the provisions of Paragraph 15 hereof, which it may sustain in connection with the Contract by reason of the occurrence on or after the date of the Contract of any of the following causes:
>
> (i) the insolvency of the Buyer as hereinafter defined, or

A (ii) the failure of the Buyer to pay to the Exporter within six months after due date of payment any installment of the contract price of goods delivered to and accepted by the Buyer or the amount of any bill of exchange or promissory note to the extent to which it is given to secure payment of such installment, or

B (iii) …

(ix) …

Provided That the Company shall not be liable for any loss arising:

C (a) …

(i) …

[26] Paragraph 14 governs the ascertainment and payment of loss D and it reads as follows:

Ascertainment And Payment Of Loss

14. The Company will pay to the Exporter the sum hereby insured immediately after loss has been ascertained and such E loss shall be ascertained:

(1) where the loss is due to the occurrence of the cause specified in paragraph 2(i) of this Policy, immediately after such occurrence;

F (2) where the loss is due to the occurrence of the cause specified in paragraph 2(ii) of this Policy, immediately after the expiry of the period of six months therein mentioned;

G (3) where the loss is due to the occurrence of the cause specified in paragraph 2(iii) of this Policy:

(a) if the Buyer has made an irrevocable deposit ...; or

(b) if the Buyer is prohibited from ...

H (4) in all other cases:

(a) where the date of the occurrence of the event is the cause of loss it is possible to ascertain when any installments of the contract price became or would have become due, then, as regards such instalments of the I loss shall be ascertained four months after the occurrence of the event is the cause of loss whichever is later;

(b) where the date of the occurrence of the event which is the cause of loss it is not possible to ascertain when all of any installments of the contract price would have become due, then as regards such installment or instalments the loss shall be ascertained four months after the occurrence of the event which is the cause of loss.

Provided That

(a) at any time after a loss has been ascertained the Company may elect to pay the loss calculated on the total contract price in the manner provided for in paragraph 15(1) of this Policy and payment of the insured percentage of loss so calculated shall be a full and complete discharge of the Company's liability hereunder.

(b) where the Buyer claims to be justified in withholding payment of the contract price or of any installment thereof or of any part of such price or of any such installment by reason of any payment, credit, set-off or counter-claim, or for any other reason to be excused from performing its obligations under the contract, the loss shall not be ascertained unless the Company agrees in writing to the contrary, until either the Buyer has withdrawn such claim or the Exporter has established the validity or invalidity of such claim by legal proceedings against the Buyer in the Buyer's country or (if the Company in its absolute discretion shall agree) in such other manner as the Company may approve in writing but in any case not earlier than the appropriate time herein before specified.

(c) where the Exporter has obtained a guarantee of payment of any instalments or part of the total contract price and the Exporter is entitled to claim under the guarantee, loss shall not be ascertained until the guarantor has paid the amount payable under the guarantee or the Exporter has obtained a judgment against the guarantor in a court in the country specified in paragraph 9 of the Schedule or the Exporter has satisfied the Company in such manner as the Company may determine that the Exporter's claim against the guarantor is a valid claim, but in any case loss shall not be ascertained earlier than the appropriate time herein specified.

[27] It is clear that para. 2 sets out the type of risks covered for which the defendant had promised to pay. That promise nevertheless is "subject to the terms hereof" which infers that other terms of the Specific Policy may apply and may need to be met. One of those terms would be para. 14 which provides for the ascertainment of loss and para. 15 which provides for the actual calculation of loss. The initial argument of the plaintiff that a claim lodged under para. 14(2) only requires a lapse of six months before loss is ascertained was quite rightly abandoned by learned counsel for the plaintiff. On a proper reading of para. 14, it shows that the provisos apply to the whole of para. 14 and not merely to para. 14(4). Hence, it is not sufficient to merely allow a time lapse of six months to solidify a claim. There still must be shown that the matters mentioned in the provisos either have no application or have been satisfied in one way or another, including being waived by the defendant before loss is ascertained and the obligation to pay must be met by the defendant.

[28] Before pressing on with the other aspects of this case, I pause to make two observations. The first concerns the way proviso (c) is referred to. It is not accurate to refer to this proviso as "para. 14(4) proviso (c)" as was done by the parties in their submissions and in their correspondence with each other. Such a reference is somewhat inconsistent on the part of the defendant who has chosen to read the provisos as applicable to the whole of para. 14. In order for the provisos to apply to the whole of para. 14, which is what was intended and what I find is in fact its proper reading, the provisos ought to be referred to simply as "provisos in or to para. 14". The provisos do not form part of para. 14(4) nor was it intended to apply to sub-para. (4) alone. This is evident from a reading of proviso (a) which provides that "at any time after a loss has been ascertained the company may elect to pay the loss calculated on the total contract price in the manner provided for in para. 15(1) of this Policy and payment of the insured percentage of loss so calculated shall be a full and complete discharge of the company's liability". Surely this is regardless of whether the ascertainment of loss is occasioned by para. 14(1), (2), (3) or (4). Affixing sub-para. (4) in relation to the provisos may have been the cause of the confusion or misunderstanding between the parties in the first place.

[29] The second observation concerns para. 16(2). Specifically, in its letter dated 7 September 2001 to the plaintiff (bundle A p. 5), the defendant remarked that the plaintiff was supposed to "notify MECIB in writing of the occurrence of any event likely to cause

loss within 30 days of becoming aware of such occurrence". Apart from this remark, there is no other. It can therefore be safely assumed that this remained an observation and a technicality, and is of no significance as the matter was not pursued by the defendant.

[30] In the matter of the provisos and dealing immediately with the question of whether both provisos apply, my answer is, it depends. From my reading of these provisos, it is possible that a situation may present itself where not only there is a guarantee/ letter of undertaking by Layne Christensen but, World Cover is also claiming to be justified in withholding payment. In which case, it may well be within the defendant's right to require compliance of both provisos before loss may be said to have been ascertained. But, as will be seen, this was not the position in this case.

Whether Proviso (B) To Paragraph 14 Applies

[31] Dealing first with proviso (b), I find that this proviso does not apply here. When the plaintiff lodged its claim *vide* letter dated 29 August 2001, it was acknowledged by the defendant *vide* letter dated 7 September 2001 (bundle A p. 5). In this letter, the defendant informed the plaintiff that:

> Paragraph 14(4), proviso (c) of the Policy stipulated that if you have obtained an Independence Guarantor, in this case Layne Christensen Company, MECIB would not admit any liabilities or the loss shall not be ascertained until the guarantor has paid the amount payable under the guarantee or the Exporter has obtained a judgment against the guarantor in a court in the USA or the Exporter has satisfied MECIB in such manner as the Exporter's claim against the guarantor is a valid claim.
>
> As such you are advised to enforce your guarantee immediately and obtain a judgment before MECIB could consider any admission of liability on the claim.

[32] From the defendant's own response to the plaintiff's claim, it can be seen that the defendant relied on proviso (c) to para. 14 and not proviso (b). This letter was followed by a meeting between the parties on 14 September 2001 at the defendant's office, the details of which are contained in letter dated 19 September 2001 (bundle A p. 7]. At this meeting, there is mentioned that the non-payment by World Cover was "... apparently attributed to the dispute or

counter claim made by World Cover over the supply of steel of which did not meet the specification." It was at this point that the defendant then proceeded to rely on proviso (b) and advised the plaintiff "... to resolve the dispute with World Cover or obtain favourable court judgment against World Cover in the manner as stipulated above."

[33] What may be summed up from all this is that although the defendant set out requiring the plaintiff to comply with proviso (c), it altered its course and also required compliance under proviso (b). The appropriate question to address then is whether having required compliance under one proviso, is it open to the defendant to subsequently require compliance under another.

[34] From the evidence, I see obvious efforts by the parties to ascertain loss so that payment can be made. Except, the efforts proved rather elusive as is said in common parlance, "the goal posts keep changing". To me, as the author of the export-credit insurance policy, of which the Specific Policy is a standard form policy for the defendant, it ought and must have been well aware of its terms. The defendant ought to have addressed and satisfied itself as to all the matters in the three provisos, including whether to waive the compliance of any of the requirements stipulated in any one of those provisos. Having required the plaintiff to comply with proviso (c) and more importantly, having led the plaintiff to rely and act on such requirement, it is not open to the defendant to subsequently require another additional compliance. The defendant cannot rely on cover of "without prejudice" provisions as the principle of estoppel will operate to prevent injustice - see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283.

[35] Be that as it may, I find that proviso (b) in any event does not apply in the facts of this case. There is no evidence that World Cover claimed to be justified in withholding payment to the plaintiff.

[36] The word "claim" does not necessarily infer a claim filed in court. According to *Black's Law Dictionary*, "claim" means "The aggregate of operative facts giving rise to a right enforceable by a court ... The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional ... A demand for money or property to which one asserts a right." The parties have not used this word with any qualification and I shall

attach only the ordinary dictionary and common sense meaning to the word. It means that there must be an assertion or demand by World Cover that it is justified in withholding or refusing payment to the plaintiff.

[37] There is no evidence, be it in the form of a letter or an email from World Cover, tendered to show the operation of this proviso. What was relied on and presented as evidence of such a claim was instead a letter from Layne Christensen as seen at bundle A p. 4 which states:

> We are in the final stages of finishing up the Tulsa job. Due to the well-documented problems with materials from Alom, the costs to WorldCover to complete the job were substantial. Alom will receive an accounting of these costs incurred by WorldCover. At this time, it appears that these excessive costs will exceed any monies due to Alom from WorldCover.

[38] A careful read of this letter will show that this was not a claim by World Cover at all. This letter merely indicated a position taken by Layne and even then, it says nothing about withholding of payment due from World Cover. It merely expressed a view which appears to be neither conclusive nor final - "... At this time". I cannot accept this to represent a claim by World Cover that it is justified in withholding payment due to the plaintiff. To me, there must be direct evidence from World Cover. For proviso (b) to operate, there must be a specific claim from World Cover that it is justified in withholding the payment to the plaintiff.

[39] It cannot be said that there is an "aggregate of operative facts giving rise to a right enforceable by a court" since no such facts have been identified. What is important to keep in focus is that where there is any dispute, if indeed there is one between World Cover and the plaintiff, that dispute is actually outside the scope of these proceedings for various reasons. One of which is jurisdictional and for which the insurance was taken out in the first place. It is not for the defendant to claim or prove justification of withholding payment on World Cover's behalf.

[40] In fact, in *Boman Industries Pty Ltd v. Export Finance and Insurance Corporation* [1990] NSW LEXIS 10744; BC9002542, an authority cited by the defendant, the New South Wales Supreme Court made precisely these observations. The terms of the insurance contract are said to provide the parties with an "... identifiable and

certain criterion for the ascertainment of loss in the case where the buyer claims it is excused from payment." In which case it was not for the insurance company to determine whether the non-payment was justified but for the court to determine. The reasons are cogent as "It means that EFIC is not drawn into the dispute between the exporter and the buyer, and does not have to undertake the burden of judging for itself the merits of the dispute - including whether the buyer's claim does not amount in law to a defence. It would be contrary to the bargain whereby EFIC was not the arbiter of the validity or invalidity of the claim to require it to be the judge of whether the buyer's claim does not amount in law to a defence. Further, EFIC is not in a position to properly undertake that role. Commonly, whether a claim is vexatious turns on facts which are obscure or contested; EFIC has no way of testing the buyer's claim so far as it turns on such facts. Even where whether a claim is vexatious turns on a question of law, EFIC's function is not to resolve such a question, to undertake what may be a difficult judgment - its bargain was that it should not have to do so, but unless agreed otherwise could act upon the determination of a court. One reason, at least, for the determination of the validity or invalidity of the claim in legal proceedings between the exporter and the buyer is the recognition of EFIC's position of disadvantage."

[41] Coming back to the facts of this case, the evidence reveals the defendant itself seeking to ascertain the merits of non-payment by World Cover. By email dated 14 September 2002 (bundle A p. 83), DW1 wrote:

> ... We were also informed that your reason in withholding payment was due to the failure of our policyholder to provide a Performance Bond. … Having gone through the subcontract we could not find any clause that requires Alom to provide the Bond. As such, we would appreciate it if you could explain to us what exactly the reason for you to withhold the payment. If we still do not satisfied with the reason given we would not hesitate to effect legal action against World Cover and the Guarantor ie, Layne Christensen Company on behalf of our policyholder. We are fully aware that Layne is listed on NASDEQ, hence litigation effected by the government agency like us would somehow affect the reputation. For your information, we are also a member of BERNE UNION and under such union we're obliged to share the information on the blacklisted buyers amongst the members including US EXIM. We reckon that you wouldn't like your name be in the list, right?

[42] There was no response from World Cover and the matter was not pursued by the defendant. That email however has proved rather useful in other respects. In the first place, it shows that there was no claim by World Cover about withholding or justifying its withholding of payment. Second, it reveals the defendant's own understanding of the question of non-payment. Even the defendant itself was dissatisfied with World Cover for withholding payment and for which the defendant itself threatened legal action with its supposed adverse ramifications on Layne Christensen. In my judgment, I can only conclude from the contents of the email that the defendant had decided that the withholding of payment by World Cover was unjustified. Though it need not and ought not to have undertaken the exercise in the first place, it did. Having reached the conclusions which I have just observed, it would be highly irregular for the defendant to now claim otherwise. The submissions of the defendant in this regard are therefore not sustainable on the facts.

[43] The view taken by the defendant concerning the unjustified withholding of payment by World Cover is shared by Plus Three Consultants (M) Sdn Bhd, the consultants who prepared a report which was offered by the plaintiff to the defendant in support of its claim (bundle A pp. 99 - 117). At p. 117 of the report, it was stated that:

> 6. Based on the documentary evidence made available for inspection in preparation of this report it would appear to be the position that:
>
> 6.1.1 Alom do not have a contractual obligation to provide Bid, Performance or Defects Bonds;
>
> 6.1.2 Alom have completed their obligations under the contract, and their supplies have been accepted under the Original Contract;
>
> 6.1.3 World Cover Inc do not have entitlement to withhold monies from Alom on account of alleged failure to provide bonds;
>
> 6.1.4 World Cover are in breach of their obligation to issue a Certificate of Substantial Completion since notice has been given by Alom;
>
> 6.1.5 World Cover are in breach of their obligation to make payment to Alom within 10 days of receipt of payment from the main Contractor, Barton Construction.

[44] While this report states a positive assertion that World Cover is not entitled to withhold monies from the plaintiff, it is not the same nor can it be inferred that World Cover has made a claim that it is justified in withholding payment. In the absence of such a claim and for the reasons already explained, proviso (b) does not apply.

Whether Proviso (C) To Paragraph 14 Applies

[45] Dealing next with proviso (c), the issue is whether proviso (c) applies and, whether the conditions in that proviso are to be read disjunctively or otherwise. In this regard, let me say at the outset that proviso (c) indeed applies because there is undeniably a guarantee provided by Layne Christensen.

[46] The very risk or fortuity for which this insurance was purchased occurred. Yet, it was the defendant's case that before the loss is ascertained and payment can be made, the plaintiff was obliged get Layne Christensen to pay the amount payable under the guarantee; obtain a court judgment against Layne Christensen from a court in the United States and also satisfy the defendant in such manner as the defendant may determine that the plaintiff's claim against Layne Christensen is a valid claim. All these conditions referred to as "conditions precedent" by the defendant was submitted by the defendant's counsel to require conjunctive reading. The plaintiff had accordingly been informed *vide* the defendant's letter dated 7 September 2001.

[47] I disagree. The word "or" in this proviso is clearly used as an alternative to the several conditions or circumstances, that it is disjunctive. This is the plain and ordinary meaning of the word "or". To read in the manner suggested by the defendant which though available in statutory interpretation is not the settled understanding in commercial contracts including the instant contract. If one were to give it the meaning of "and" as proposed by the defendant, it may lead to an absurdity or illogicality which objectively, the parties could not have intended. It is difficult to envisage how the plaintiff could still procure a judgment for the same against Layne Christensen in the US courts or even here after the plaintiff has succeeded in securing payment from Layne Christensen. And, after procuring these two conditions, the plaintiff is further expected to satisfy the defendant in the manner as determined by the defendant that the plaintiff's claim against Layne

Christensen is a valid claim. It is my considered view that it can only be open to the defendant to choose either one of the three requirements set out in proviso (c). It cannot choose all three. I do not see the need to engage the *contra proferentum* rule as there is no ambiguity in these words. This submission is therefore rejected.

[48] From the evidence presented, I find that the defendant had in fact made an option when it asked to be shown certain information and documentation. At the last paragraph of the letter dated 7 September 2001, the defendant said:

> In addition to the above, we would appreciate it very much if you could provide us with the following information:
>
> i) Letter of Offer duly accepted by World Cover Inc USA;
>
> ii) Export documentation pertaining to the subject claim;
>
> iii) Correspondences from World Cover Inc USA pertaining to the transaction;
>
> iv) Reason for non-payment by World Cover Inc USA.
>
> Please note that our advice is strictly on a "Without Prejudice Basis" and shall not be construed as an admission of liability whatsoever on our part.

[49] In my view, the information sought in the last paragraph must be for the purpose of determining whether the plaintiff's claim against Layne Christensen is a valid claim. It cannot be for any other purpose since at this point in time the defendant already is in possession of "... the claims form and other correspondences in respect of the above Policy." Having being presented by the plaintiff who relied on that request, it would be wrong for the defendant to now reject the claim when presented with the information and documents sought.

[50] On the issue of the role of the independent debt collecting agencies and the two reports, Mr. Faizal Hassan had submitted that this was misunderstood by the plaintiff. The names of the debt collecting agencies were given for no other reason but to assist the plaintiff in going about its claim against Layne Christensen and World Cover in the United States since these agencies are specialists in such matters. These agencies could also act as mediators for any claims brought against these two companies. That may well have been the role for these agencies. However, from the

A evidence presented, it can be seen that the defendant appreciated the reports of these agencies as these reports provided support for the plaintiff's assertion that the claim is valid. In the plaintiff's letter dated 19 August 2002, the plaintiff was informed that it would be given a "... list of several debt collector agencies to obtain their B opinion as to the merits of the case. It is understood that a similar opinion advocated by the selected pre approved agency will satisfy Mecib to the conclusions as derived by Plus 3 Consultants contained in its executive summary." - see bundle A p. 9. It is unlikely for the defendant to have emailed World Cover with C indications that it as opposed to the plaintiff would be initiating legal action against Layne Christensen. The defendant is unlikely to have made this claim to World Cover if it did not share in the views as expressed by the two consultants in their reports.

D **[51]** Relying on the decision of *Ontario Ltd [Receiver and Manager of] v Export Development Corp* [2005] O.J. No. 3066 ON.C. LEXIS 3744, Mr. Faizal Hassan also submitted that the burden was on the plaintiff to show that the claim was within the terms of the policy. Even for a claim under para. 14(2), the plaintiff must show that E the goods delivered to World Cover had been accepted with satisfaction. The court was invited to look at the letter from Layne Christensen and the defendant's own letter dated 19 September 2001 to infer that there had been no acceptance of the goods and, that there were issues between World Cover and the plaintiff.

F **[52]** I find it difficult to accept this argument as I have said earlier the court is not sitting in determination of the product or goods dispute but in relation to the insurance policy. That issue remains between World Cover and the plaintiff and in export-credit insurances the emphasis is precisely to shift away from such issues. G For this purpose, all that needs to be shown are the delivery orders or packing lists, bills of lading, shipping reports, quality control sheets which evidence receipts and the unpaid invoices or monthly progress claims for payments. Such evidence is before me in bundle B and that suffices.

H **[53]** In any case, I do find that the plaintiff has shown that its claim is "within the four corners of the subject policy" and that the loss is "within the perils insured against". Until the date of trial, there was still non-payment by World Cover and that is not a "mere I happening" but a fact unlike the facts in *Ontario Ltd* where two of three yachts which were the subject matter of the export-credit insurance were returned by the buyers.

[54] The instant case is further distinguishable from *Boman Industries Pty Ltd* relied on by the defendant. In *Boman*, there were disputes as to whether the goods, furniture, had been delivered and accepted by the buyer within the meaning of cl. CL(ii) of the policy taken. The goods never reached the buyer - "there was little doubt that it reached Miami". The buyer in fact wrote to the seller that "We have never received any merchandise and therefore the draft is to be returned unpaid. Further we do not at this time wish to order or receive any merchandise from Boman Industries PTY LTD". Because the contract was a c.i.f. contract, there was a fair amount of debate on delivery by performance upon acceptance of bills of exchange and delivery of bills of lading. After looking at the facts of the case, the court found that the refusal to pay was within the terms of the policy and the claim was refused. This is distinctly and vitally different from the facts in this case where for the reasons cited earlier, the goods have been accepted by World Cover.

[55] In any case, having examined the independent reports and having heard the testimony of Mr. Michael James McIver (PW1), the consultant from Plus Three Consultants (M) Sdn Bhd who prepared the one of the two reports; and Phillip Yiin Chung Leong (PW2), the managing director of the plaintiff company who testified, *inter alia* on the operations and execution of the supply of goods to World Cover, I am satisfied that the plaintiff's claim against both Layne Christensen and World Cover is valid and justified. The two independent reports corroborate and complement each other as well as support the plaintiff's claim. World Cover has never returned any of the goods sold and delivered. The goods therefore must have been duly accepted and utilized in the airport project. Significantly, the main contract, under which the present subcontract was premised, has also been satisfactorily completed by World Cover and whose works have been accepted by the principal contractor, Barton Construction. That principal contractor's work too has been formally accepted by the Tulsa Airport Investment Trust (TAIT) - see bundle A p. 120.

Specific Policy: Paragraphs 17 And 18

[56] Finally, I would like to refer to two other clauses, namely paras. 17 and 18. Paragraph 17 is one of two clauses concerning "prevention and notice of loss" and it reads as follows:

17. Upon payment by the Company the Exporter shall:

(1) take all steps which may be necessary or expedient or which the Company may at any time require to effect recoveries, including (if so required) the institution of proceedings;

(2) upon request assign and transfer to the Company his rights under the Contract, including his right to receive any sums payable thereunder and his right to damages for any breach thereof;

(3) upon request deliver up to the Company any goods in respect of which such payment has been made and any documents relating thereto and assign and transfer to the Company his rights and interest in any such goods and documents; and

(4) upon request assign, deliver up or otherwise transfer to the Company any negotiable instruments, insurance or other securities relating to such goods or the Contract.

[57] Paragraph 18 on the other hand provides for recoveries and it states:

> Any sums recovered by the Exporter or the Company in respect of the contract after the date at which the loss is ascertained, whether from the Buyer or from any other source shall be divided between the Company and the Exporter in the proportion in which loss is borne by them respectively, whether or not such division results in the retention by the Company of a greater or lesser sum than the amount paid by the Company under this Policy. The Exporter shall pay all sums recovered to the Company forthwith upon receipt thereof either by himself or any person on his behalf, the Exporter hereby acknowledging and declaring that until such repayment is made to the Company he receives and holds such sums in trust for the Company.

[58] These two paragraphs shed precious light on the meaning and operation of the terms of this Specific Policy. All terms in the Specific Policy must be read together and given an interpretation such that any inconsistency between the terms is avoided. From these provisions, it is clear that the Specific Policy is not intended to operate in the manner suggested or interpreted by the defendant. The fact that recovery or "claw back" may be realized in any manner and at any time, including after payment of the claim to the plaintiff is indicative of the fact that the interpretations by the defendant are wrong. Reading the Specific Policy in totality, it is clear that if the plaintiff had wanted to avoid bearing the responsibility for recovery or claw-back, it ought to have made its

choices early and in accordance with the terms of the contract. Having made its choice, it cannot now renege on its obligations as promised in the Specific Policy. From the evidence tendered, the defendant had satisfied itself as to the validity of the plaintiff's claim. I can only reasonably conclude from this that loss is ascertained under para. 14 of the Specific Policy. I find that the defendant was wrong to deny the plaintiff's claim. It would be both unfair and unreasonable to hold otherwise as the commercial purpose for which this insurance contract was made would be defeated with a resulting absurdity which is also manifestly unjust.

[59] I do not propose to go into the issue of the quantum of the claim. As mentioned at the outset, in the event the claim is proved, which is the case here, the only appropriate relief must be the payment due under the Specific Policy, that is 90% of the amount due and unpaid by World Cover, that is a sum of USD603,000 on an exchange rate of USD1 @ RM3.80.

Conclusion

[60] In the circumstances, the plaintiff's claim is allowed together with interest at the rate of 4% per annum from 29 August 2002 to the date of realization together with costs of RM60,000 to the plaintiff having regard to the complexities of the case and the amount of research done.